90-1791

No. _____

In The

Supreme Court Of The United States

OCTOBER TERM, 1990

THOMAS M. GERMAIN, TRUSTEE FOR THE ESTATE OF O'SULLIVAN'S FUEL OIL CO., INC.,
Respondent,

v.

THE CONNECTICUT NATIONAL BANK,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1) Whether no special and important reasons exist to review the Court of Appeals well reasoned determination that it lacked jurisdiction, pursuant to 28 U.S.C. §§ 158(d), and § 1292(b) over an appeal from the order of the District Court, affirming a certified interlocutory order of the Bankruptcy Court.

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Respondent, Thomas M. Germain, Trustee for the estate of O'Sullivan's Fuel Oil Co., Inc. ("Trustee"), respectfully requests that

petitioner, The Connecticut National Bank ("CNB") request for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Second Circuit be denied. All parties to the proceeding in the Court of Appeals whose decision is sought to be reviewed, are as set forth in the caption.

For purposes of this review, the respondent agrees generally with the statements on the Decision below, Jurisdiction, and the Statement of the Case as set forth in Petitioner's brief at pages 1-4. The decision of the United States Courts of Appeals for the Second Circuit is reprinted in the Appendix to the Petitioner's Brief ("Petioner's App.") at pages 12a-28a.

SUMMARY OF ARGUMENT

There are no special and important reasons to review the Court of Appeals' determination that it lacked jurisdiction over petitioner's appeal from the order of the District Court affirming the certified interlocutory order of the Bankruptcy Court pursuant to 28 U.S.C. § 158(d). The result reached below by the well respected judges on the Second Circuit Court of

Appeals is well reasoned, logical and amply supported by the legislative history of § 158. Notwithstanding CNB'S broad assertions to the contrary, there are no decisions of this Court which conflict with the decision below. While there may be a few cases in the Federal Circuit Courts of Appeals appearing to the contrary, the great weight of authority in the Circuits are in comport with the result reached in the instant case. Moreover, the Petitioner's reliance on the majority of these cases cited in his brief is misplaced as they address the issue of jurisdiction over final judgments rather than interlocutory orders of the Bankruptcy Court. Appellant jurisdiction of the Courts of Appeals over all interlocutory orders of the bankruptcy court is neither a compelling nor a substantially important issue to consider and the Second Circuit's decision is in harmony with the strong public policy against piecemeal interlocutory review of federal court actions.

REASONS FOR DENYING THE WRIT

I. THERE ARE NO SPECIAL AND IMPORTANT REASONS TO REVIEW THE COURT OF APPEALS' DETERMINATION THAT IT LACKED JURISDICTION TO REVIEW A CERTIFIED INTERLOCUTORY ORDER OF THE BANKRUPTCY COURT.

After a long, careful and exhaustive consideration of the issue, the Second Circuit determined that it lacked appellant jurisdiction, pursuant to 28 U.S.C. § 158(d) to hear an appeal from an interlocutory order of the Bankruptcy Court. *Germain v. The Connecticut National Bank*, 926 F.2d 191 (2nd Cir. 1991). In reaching this decision, the court made a detailed examination into the legislative history of 28 U.S.C. §§ 158 and 1292, the latter dealing generally with appellant review of interlocutory orders of federal district courts. Petitioners App. at 18a-25a. From the language of the statutes and from the legislative history, the court concluded that it lacked jurisdiction over the interlocutory order pursuant to § 158. *Id.*

While § 1292(b) applies generally to appellate jurisdiction over interlocutory

appeals, § 158(d) grants a court of appeals "jurisdiction of appeals from all final decisions, judgments, orders and decrees entered under subsections (a) and (b) of this section." 28 U.S.C. § 158(d). Under § 158, the district court is granted "jurisdiction to hear appeals from final judgments, orders and decrees, *and with leave of the court, from interlocutory orders and decrees* of bankruptcy judges." 28 U.S.C. § 158(a) (emphasis added). In addition to the fact that § 158(d) would be otherwise superfluous, the legislative history of § 158(d) and its predecessor § 1293(b) delineated a clear and deliberate intent of Congress to limit direct appellate review of piecemeal interlocutory orders of bankruptcy judges by Courts of Appeals. Petitioner's App. at 22a-26a. The Court concluded that with regard to interlocutory appeals from bankruptcy courts, § 158 was the exclusive source of jurisdiction and in accord with the great weight of opinion in other circuits, it lacked jurisdiction to hear petitioner's appeal. *Id.* at 26.

II. THE COURT OF APPEALS HAS DECIDED A SUBSTANTIALLY UNIMPORTANT QUESTION OF FEDERATE LAW CONCERNING INTERLOCUTORY ORDERS OF BANKRUPTCY COURTS WHICH DOES NOT REQUIRE THIS COURT'S REVIEW.

The question decided by the Court of Appeals for the Second Circuit is not a substantially important question of federal law which must be reviewed.[1] The Court of Appeals' decision is in comport with the strong policy against piecemeal interlocutory review except where such appeal is expressly authorized by statute. *See Pacific Union Conference of Seventh-Day Adventists v. Marshall*, 434 U.S. 1305, 1309 (1977)(per Rehnquist, J., as Circuit Justice). This is a serious reflection of the delays, inconvenience and costs of such review.

Pursuant to § 158(a), the district court has the authority to review interlocutory orders of bankruptcy judges, filed with leave of court. Thus a litigant is provided with appellate review of a bankruptcy judge's interlocutory orders. The fact that a court of appeals may not hear appeals from interlocutory orders from bankruptcy judges does not bar all or even the most important review. Interlocutory orders are merged into final judgment and are reviewable on appeal from the final judgment.

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[1] *But see Tidewater Oil Co. v. United States*, 409 U.S. 151, 153 (1972)(granting certiorari to decide whether Expediting Act, 15 U.S.C. § 29 precluded appellate jurisdiction over interlocutory appeals in a civil antitrust action pursuant to 28 U.S.C. § 1292(b)).

Thus, all review is not denied and does not discourage or prevent a litigant from appealing a final order, decree or decision of the bankruptcy judge to the appellate court pursuant to § 158(d).

The holding of the court below squares with the strong policy of discouraging piecemeal interlocutory review and is not a denial of appeals altogether. Interlocutory appeals are merely limited both to discretionary review under § 158(a) by the District Court of interlocutory orders of the bankruptcy judge and pursuant to § 1292, a Court of Appeals' review of interlocutory decisions where the interlocutory order originated in the District court. Thus, in either instance, interlocutory orders are subject to appellate review, demonstrating that this matter is not one of substantial interest, since the litigant is provided with an appellate remedy to rectify any improper situations.

III. THE COURT HAS DECIDED A FEDERAL QUESTION IN A WAY THAT SQUARES WITH APPLICABLE DECISIONS OF THIS COURT.

The Court of Appeals for the Second Circuit has decided a federal question in a way that squares with applicable decisions of this Court. Petitioner's contentions that the Court of Appeals' decision repealed by implication §

1292 with regard to interlocutory decisions of bankruptcy courts appealed to the District Courts and that such an approach runs counter to two canons of statutory construction and to which it cites several cases are clearly inaccurate. The Court of Appeals' approach does not necessarily run counter to either of the policies of these canons of statutory interpretation.

All canons of construction are merely guidelines for the Court to observe in its examination into the language of the legislative history behind and the legislative intent for a particular statute *Rodzanower v. Touche Ross & Co.*, 426 U.S. 148, 164 (1976)(per dissenting opinion of Stevens, J.). Normally, two statutes capable of coexistence are each to be given effect, but only providing that their sense and purpose can be preserved. *Watt v. Alaska*, 451 U.S. 259, 267 (1981). Moreover, narrower and more specific statutes are controlling over more general statutes unless the Court finds a clear and manifest Congressional intent to the contrary. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 402 U.S. 437, 445 (1985); *Busic v. United States*, 446 U.S. 398, 406 (1980); *Radzanower v.Touche Ross & Co.*, 426 U.S. at 153.

In the instant case, the Court of Appeals made an exhaustive examination into the language history and intent of both 28 U.S.C. §§

158 and 1292. In a well principled decision, the Court found that the legislative history clearly indicated that certain amendments to Title 28 including § 158 were made to clarify that with respect to certain determinations of bankruptcy cases, only appeals from District Courts to Courts of Appeals were affected and not appeals of Bankruptcy Courts to District Courts.

The Court found that § 1292(b) could not provide it with jurisdiction in the instant case as the analysis of § 158 revealed that Congress intended to narrow Courts of Appeals' jurisdictions over bankruptcy cases. Thus, unless § 158(d) provides the exclusive means of jurisdiction to review orders entered under § 158(a), then § 158 is superfluous and dead weight as Courts of Appeals already have jurisdiction over final decisions of the District Court pursuant to 28 U.S.C. § 1291. Since § 158(d) was found to be exclusive, there was similarly no jurisdiction under § 1292(b).

In short, for the narrow proviso of § 158(d) to be given any effect, the Court necessarily declined jurisdiction pursuant to the more general provisions of § 1292(b). Thus, its approach was not contrary to the rule that statutes capable of coexistence are whenever possible to each be given. A different result clearly would have ignored the sense and

purpose of § 158. Furthermore, while it is true that implicit repeals are disfavored, this is only another guideline for a court, albeit a strong one, in discerning legislative intent. Adherence to this canon of construction, like others, is not required under all circumstances especially as in the case at bar where the intentions of the legislative are clear and manifest. Simply put, it is not a hard and fast rule to be rigidly applied to every situation.

The Court of Appeals made a long and searching examination of the legislative history that composed almost one-half of its opinion before making its determination. This is contrary to the Seventh Circuit's cursory conclusion, in *In re Moens*, 800 F. 2d 173, 177 (7th Cir. 1986), the case cited to by the petitioner. While that Court reached a different conclusion, it failed to demonstrate or even document any examination into the legislative history of §§ 158 and 1292. Instead it merely made the bare statement that the legislative history and the text of § 158 did not indicate that § 158 was its sole source of jurisdiction and thus may be wrongly decided. It cannot support petitioners contention that Congress did not intend the result reached below.

History, precedent and principal leave no ground for doubt that the Second Circuit Court of Appeals properly interpreted § 158(d) in a

manner consistent with canons of statutory construction and with applicable decisions of this Court.

IV. WHILE THERE MAY BE SOME CONFUSION, FEW COURTS HAVE DECIDED THAT 28 U.S.C. §158(D) GRANTS JURISDICTION TO COURTS OF APPEALS OF INTERLOCUTORY ORDERS OF THE BANKRUPTCY COURTS, AS OPPOSED TO FINAL ORDERS THEREOF.

While there may be some minor disagreement on the subject, the clear weight of authority is that § 158 precludes Court of Appeals' review of interlocutory orders of the bankruptcy court.

While it is true, as petitioner correctly points out, that the Ninth Circuit once held that 28 U.S.C. § 158(d) precluded application of § 1292(b) with regard to all bankruptcy appeals, the Ninth Circuit has retreated from its earlier position. In *In re Benny*, 791 F.2d 712, 717-20 (9th Cir. 1986) the Ninth Circuit concluded that only § 158(d) vested the court with jurisdiction over an appeal taken pursuant to § 158(a) from the bankruptcy court to the District Court. As this holding is the same as the one reached below in the instant case, there is no conflict between the Second and Ninth Circuits on this issue.

The Petitioner also suggest there exists a series of cases which contradict the Second Circuit decision by holding that § 1292(b) is available for all bankruptcy appeals. While there may be some surface attraction to the Petitioner's claim, however, this contention misses the mark. The issue addressed by the Second Circuit is whether *interlocutory* orders, judgments and decisions of bankruptcy courts are subject to review of Courts of Appeals either pursuant to § 1292 or § 158. With all but a few exceptions, the decisions cited by the petitioner may be distinguished by the opinions' failure to address this particular issue, by the language limiting jurisdiction to final resolutions and judgment of the bankruptcy courts or by mere dicta which is not controlling. *See Teton Exploration Drilling v. Bokum Resources*, 818 F.2d 1521, 1524 (10th Cir. 1987)(finding jurisdiction over District Court's order confirming final judgment of bankruptcy court); *In re Salem Mortgage Co.*, 783 F.2d 626, 632 (6th Cir. 1986)(under either 28 U.S.C. § 158 or 1291, a final decision is required for appellate jurisdiction.)

The petitioner's reliance on *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190 (Third Circuit 1983) is also misplaced. In dicta, the court merely suggested reservations over whether the Court of Appeals had jurisdiction over interlocutory orders of the

bankruptcy court, and that it would require "critical analysis" before it decided the issue. *Id.* at 200 n. 2. Further, the court clearly indicated that its holding made it unnecessary to consider this issue. *Id.* at 200. Thus, its later decision in *In re Brown*, 803 F.2d 120 (3rd Cir. 1986) is merely the logical extension of this case as it considered § 158, and reasoned that the finality requirement prevented it from entertaining jurisdiction over interlocutory orders of the bankruptcy court. *Id.* at 120-121. Of course, the decision in *Brown* also clearly supports the decision of the court below and merely demonstrates the development of the issue in the Third Circuit.

V. THE OPINION OF THE COURT BELOW HAS AUTHORITATIVELY DECIDED THE ISSUE IN THE SECOND CIRCUIT.

It is true that prior to this case at bar, there were several decisions of the Second Circuit on the issue which could not be harmonized. However, the court below recognized the inconsistencies and addressed the issue *de novo* and then circulated its opinion to all the other active judges on the Second Circuit Court of Appeals. As no active judge sought *en banc* consideration on the issue despite the prior inconsistent precedents, the decision reached below is tantamount to an *en banc*

consideration. Thus, in the Second Circuit, the issue has now been authoritatively and finally resolved.

As petitioner contends, the Fifth Circuit has demonstrated some inconsistencies over whether § 158 supercedes § 1291 with regard to orders from final judgments. However, there is no inconsistency in this Circuit with regard to appeals of interlocutory appeals of bankruptcy judges taken pursuant to § 158(d). In *In re Barrier*, 776 F.2d 1298, 1299 (5th Cir. 1985), the Court of Appeals for the Fifth Circuit concluded that it lacked appellant jurisdiction over a writ of madamus pursuant to § 158(d), because it was not a final appealable order. In *In re Topco, Inc.*, 894 F.2d 727, 736 (Fifth Circuit 1990) the court found appellant jurisdiction over a final judgment of the bankruptcy court granted by the District Court. Even though there was a slight retreat with regard to the Court's basis of jurisdiction inasmuch as it held § 1291 as an alternate ground of jurisdiction for the final order of the district, nevertheless, it did not address review of *interlocutory* appeals from bankruptcy judges. *See In re Topco*, 894 F.2d at 737 n.14; *See also Matter of Texas Research, Inc.*, 862 F. 2d 1161, 1162 (5th Circuit 1989) (Court of Appeals has jurisdiction over final judgment of bankruptcy judge entered by District Court).

Thus, it is clear that with respect to interlocutory orders, the Fifth Circuit has not demonstrated any inconsistent precedents. Further, as indicated above, the Third Circuit's precedents are not in conflict with each other and can be reconciled. In short, respondent's contentions are misplaced inasmuch as the circuits are not materially internally inconsistent with regard to their lack of jurisdiction to review interlocutory decisions of bankruptcy judges, though a different result may be the case with regard to their basis of jurisdiction for appellate review of final judgments of bankruptcy judges.

CONCLUSION

For the foregoing reasons, it is respectfully requested that Petitioner's request for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Second Circuit be denied.

Respectfully submitted,

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ON THE BRIEF:
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AUGUST 15, 1991

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APPENDIX

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28 U.S.C. § 158 (1988)

§ 158. Appeals

(a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under § 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)(1) The judicial council of a circuit may establish a bankruptcy appellate panel, comprised of bankruptcy judges from districts within the circuit, to hear and determine, upon the consent of all the parties, appeals under section (a) of this section.

(2) If authorized by the Judicial Conference of the United States, the judicial councils of 2 or more circuits may establish a joint bankruptcy appellate panel comprised of bankruptcy judges from the districts within the circuits for which such panel is established, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(3) No appeal may be referred to a panel under this subsection unless the district judges for the district, by majority vote, authorize such referral of appeals originating within the district.

(4) A panel established under this section shall consist of three bankruptcy judges, provided a bankruptcy judge may not hear an appeal originating within a district for which the judge is appointed or designated under § 152 of this title.

(c) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d) The Courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

(Added Pub.L. 98-353, Title I, § 104(a), July 10, 1984, 98 Stat. 341, and amended Pub.L. 101-650, Title III, § 305, Dec. 1, 1990, 104 Stat. 5105)

28 U.S.C. § 1291 (1988)

§ 1291 Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292 (c) and (d) and 1295 of this title.

28 U.S.C. § 1292 (1988)

§ 1292. Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof,

granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

[(4) Repealed. Pub.L. 97-164, Title I, § 125 (a)(3), Apr. 2, 1982, 96 Stat. 36]

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken

from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction -

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under § 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d)(1) When the chief judge of the Court of International Trade issues an order under the provisions of § 256 (b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground

for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(2) When any judge of the United States Claims Court, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals fro the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Claims Court, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Claims Court or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

(4)(A) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a motion to transfer an action to the United States Claims Court under section 1631 of this title.

(B) When a motion to transfer an action to the Claims Court is filed in a district court, no further proceedings shall be taken in the district court, no further proceedings shall be taken in the district court until 60 days after the court has ruled upon the motion. If an appeal is taken from the district court's grant or denial of the motion, proceedings shall be further stayed until the appeal has been decided by the Court of Appeals for the Federal Circuit. The stay of proceedings in the district court shall not bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonable necessary. However, during the period in which proceedings are stayed as provided in this subparagraph, no transfer to the Claims Court pursuant to the motion shall be carried out.

(As amended Apr. 2, 1982, Pub.L. 97-164, Title I, § 125, 96 Stat. 36; Nov. 8, 1984, Pub.L. 98-

620, Title IV, § 412, 98 Stat. 3363; Nov. 19, 1988, Pub.L. 100-702, Title V, § 501, 102 Stat. 4652.)